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JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1969

**HEVI-DUTY ELECTRIC COMPANY,
A DIVISION OF SOLA BASIC INDUSTRIES, INC.,**

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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A DIVISION OF SOLA BASIC INDUSTRIES, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Hevi-Duty Electric Company, a Division of Sola Basic Industries, Inc. (hereinafter called "Company"), prays that a writ of certiorari issue to review an opinion and judgment of the United States Court of Appeals for the Fourth Circuit (hereinafter called "Court of Appeals") granting the petition of the National Labor Relations Board (hereinafter called "Board") for enforcement of its order issued against the Company.

OPINION BELOW

The opinion of the Court of Appeals is reported officially as follows: *N.L.R.B.* v. *Hevi-Duty Electric Co., a Div. of Sola Basic Indus. Inc.*, 410 F.2d 757 (4th Cir. 1969). Such opinion is appended hereto as Appendix A.

JURISDICTION

The judgment of the Court of Appeals is dated May 16, 1969, and was filed and entered on that same date. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1) (1966).

QUESTION PRESENTED

Under the guarantee of due process of law provided in the Fifth Amendment to the United States Constitution and the Board's own administrative standards, is an objecting party entitled to a post-election evidentiary hearing when, during an *ex parte* investigation on his objections to a representation election, prima facie evidence is supplied which presents substantial and material factual issues regarding the validity of such election?

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED

The constitutional provision, statutes and regulations which this case involves are as follows:

United States Constitution, Amendment V.

Section 1254(1) of Title 28 of the United States Code.

Section 160(e) of Title 29 of the United States Code.

Section 102.69(e) of the National Labor Relations Board Rules and Regulations.

The text of this constitutional provision, statutes and regulations is set forth in Appendix F.

STATEMENT OF THE CASE

The Company is a Wisconsin corporation engaged in the manufacture of transformers and other electrical devices at its Goldsboro, North Carolina plant. (4th A. 28, 32)[1] It is engaged in interstate commerce within the meaning of the National Labor Relations Act, as amended (hereinafter called "Act"). (4th A. 19).

Pursuant to a representation petition filed by the Communications Workers of America, AFL-CIO (hereinafter called "Union"), and a stipulation for certification upon consent election signed by all interested parties and approved by the Regional Director, Region 11, a representation election was conducted by the Board among the production and maintenance employees of the Company's Goldsboro, North Carolina plant on November 1, 1967. (4th A. 3-7) The Union received a majority of the valid votes cast in this election. (4th A. 7-8)

Subsequent to the vote, the Company filed timely objections, alleging in substance as follows: (1) that the conduct of one of the Union's observers was such as to impair the exercise of free choice, and (2) that the conduct of the Union in making a last minute challenge of an observer selected by the Company further impaired the free election process. (4th A. 9)

The Regional Director, Region 11, conducted an *ex parte* investigation of the objections and issued a report recommending that both objections be overruled. (Appendix E) The Company filed exceptions to the Regional Director's report, requesting the rejection of his recommendations and

[1] References to the Appendix printed for the use of the Court of Appeals and filed with this Court are designated "4th A.".

the direction of a hearing to determine the facts of the case. (4th A. 13-18) By decision dated February 12, 1968, the Board adopted the Regional Director's findings and recommendations and certified the Union as bargaining representative in the appropriate unit. (Appendix D)

Thereafter, the Company refused to bargain with the Union because it believed the election to be invalid and wanted to obtain judicial review of the Board's decision in the representation case, i.e. Case No. 11-RC-2623. (4th A. 32) As a result of the Company's position, unfair labor practice charges were filed, and a complaint was issued, alleging that by its refusal to bargain, the Company was in violation of Section 8(a)(1) and (5) of the Act. (4th A. 27-31)

In response to a trial examiner's order directing the parties to show cause as to whether or not the General Counsel's motion for summary judgment should be granted, the Company filed a memorandum in opposition to that motion on the basis of the Board's decision in *Milchem, Inc.*, 170 NLRB No. 46, issued March 14, 1968. (4th A. 33-34, 44-47) Because the Trial Examiner believed that the application of *Milchem, Inc.* was appropriate for examination in the representation case, he conditionally deferred ruling on the motion for summary judgment in order to afford the Company time to file a motion for reconsideration with the Board in Case No. 11-RC-2623. (4th A. 47-48) Thereupon, the Company filed its motion for reconsideration, and, by order dated May 7, 1968, the Board found the Company's motion to contain nothing not previously considered by it in Case No. 11-RC-2623. (4th A. 21-26)

Subsequently, the trial examiner proceeded to issue his decision granting the General Counsel's motion for summary judgment in the unfair labor practice proceeding,

and the Company filed exceptions to that decision. (Appendix C, A. 58) The Board adopted the trial examiner's findings, conclusions and recommendations in their entirety and, on July 1, 1968, issued its decision and order that the Company bargain with the Union upon request and post the usual notice. (Appendix B)

The case came before the Court of Appeals upon application for enforcement of the Board's order filed November 29, 1968. The basis for jurisdiction in that court was Section 10(e) of the Act, 29 U.S.C. §160(e). (Appendix B, p. App. 3) The Court of Appeals in a *per curiam* decision, granted enforcement of the Board's order. (Appendix A)

REASONS FOR GRANTING THE WRIT

I. The decision of the Court of Appeals conflicts with decisions of the other courts of appeals.

While the Court of Appeals in its opinion acknowledged that a post-election hearing is demandable if objections and exceptions raise material and substantial factual issues, it upheld the Board's refusal to grant a hearing on the Company's objections because it could not say "that the Board's action was unsustainable in law upon the facts found, or that there was not substantial support in the evidence for these findings". (Appendix A, pg. App. 2) The decision of the Court of Appeals which views the issue as being one of substantial evidence conflicts with decisions of other courts of appeals regarding the criteria for obtaining a hearing in post-election representation proceedings.

The United States Court of Appeals for the Fifth Circuit has stated that "§ 8(a)(5) orders which rest on crucial factual determinations made after *ex parte* investigations and without hearing cannot stand". *N.L.R.B.* v. *Air Control Prods. of St. Petersburg, Inc.*, 335 F. 2d 245, 249 (5th Cir. 1964). It is the well established position of the Fifth Circuit that a post-election hearing is required where the objecting party supplies prima facie evidence, presenting "substantial and material factual issues", which would warrant setting aside the election. *N.L.R.B.* v. *Smith Indus., Inc.*, 403 F. 2d 889, 892 (5th Cir. 1968); *see N.L.R.B.* v. *Sidran*, 181 F. 2d 671 (5th Cir. 1950); *N.L.R.B.* v. *West Tex. Util. Co.*, 214 F. 2d 732 (5th

Cir. 1954); *N.L.R.B.* v. *Dallas City Packing Co.*, 230 F. 2d 708 (5th Cir. 1956); *N.L.R.B.* v. *Air Control Prods. of St. Petersburg, Inc., supra; United States Rubber Co.* v. *N.L.R.B.*, 373 F. 2d 602 (5th Cir. 1967); *Home Town Foods, Inc.* v. *N.L.R.B.*, 379 F. 2d 241 (5th Cir. 1967); *N.L.R.B.* v. *Ortronix, Inc.*, 380 F. 2d 737 (5th Cir. 1967); *Howell Refining Co.* v. *N.L.R.B.*, 400 F. 2d 213 (5th Cir. 1968); *Monroe Mfg. Co., Div. of Continental Oil Co.* v. *N.L.R.B.*, 403 F. 2d 197, 201 (5th Cir. 1968); *N.L.R.B.* v. *Genesco, Inc.*, 406 F. 2d 393, 397 (5th Cir. 1969).

The position of the Fifth Circuit is also the rule in other courts of appeals. *E.g., N.L.R.B.* v. *Joclin Mfg. Co.*, 314 F. 2d 627 (2d Cir. 1963); *N.L.R.B.* v. *Capital Bakers, Inc.*, 351 F. 2d 45 (3rd Cir. 1965); *Sonoco Prods. Co.* v. *N.L.R.B.*, 399 F.2d 835 (9th Cir. 1968); *Excelsior Laundry* v. *N.L.R.B.*, 409 F. 2d 70 (10th Cir. 1968).

The conflict between the view expressed by the Court of Appeals in this case and the position adopted by the other courts of appeals is brought sharply into focus by the United States Court of Appeals for the Third Circuit in *Capital Bakers, Inc., supra* at 51 wherein that court stated:

> "* * * We are not concerned with the question of whether or not the evidence considered by the Regional Director is sufficient to support his finding, or whether the rejected evidence of respondent would overcome the finding; we are solely concerned with the fact that the offer and the finding raise a substantial conflict of fact which the Board's Rules and Regulations require to be determined by a hearing."

It is recognized that the objecting party may be denied a hearing when the Regional Director or the Board either assumes the facts alleged are true and decides on that basis, or they conclude that the alleged facts are legally

irrelevant. *N.L.R.B.* v. *Howard Johnson Co.*, 398 F. 2d 435, 441 (3rd Cir. 1968); *N.L.R.B.* v. *Smith Indus., Inc., supra* at 892; *N.L.R.B.* v. *Air Control Prods. of St. Petersburg, Inc., supra* at 249. However, neither of these two bases were used to dispose of the Company's objections in this case. To the contrary, the Regional Director, and subsequently the Board, simply ruled that the facts were not as alleged by the Company. (4th A. 10-13, 18-20)

Statements given to the Regional Director by Company witnesses during the *ex parte* investigation set forth the facts with regard to the Company's primary objection, to wit: contrary to the special instructions of the Board agent conducting the election and the Board's standard instructions to election observers:

(a) The Union observer cavorted down the aisles, dancing, shouting, ("Hollering" was the word used by several witnesses) and waving his sign in the air with an exaggerated bouyancy and swaggering effect far different from his normal restrained behavior.

(b) He stopped voters on the way to the polls and engaged them in conversations.

(c) He made it a point to have at least a few words to say to almost every voter, in the manner of a politician running for office—one witness described his appearance as rather like a politician out kissing babies.

(d) He shouted an obscene characterization of one voter in a tone of voice loud enough to be heard almost throughout the entire plant.

(e) There was a strong indication that he had been using intoxicating liquors.

The Company objected to this behavior because it conveyed the impression to the voters of Union dominance over the Board's election procedures and impeded the free election process. The extent and nature of the Union observer's objectionable conduct was confirmed by eye witnesses. (4th A. 13-18) The only possible method by which the Regional Director could conclude, as he did, that the Union observer's behavior had not affected the election process was by weighing conflicting testimony against the Company, discrediting other Company testimony entirely and resolving issues of credibility against the Company. (4th A. 10-13)

It is also evident from his report that the Regional Director considered the Company's objections separately in concluding that neither presented a substantial and material factual issue for resolution in an evidentiary hearing. In this regard, the Fifth and Ninth Circuits are of the opinion that an objecting party's right to a post-election hearing must be determined on the basis of the cumulative effect of the alleged objectionable acts. *N.L.R.B.* v. *Smith Indus., Inc., supra* at 895; *Howell Refining Co.* v. *N.L.R.B., supra* at 218; *Sonoco Prods. Co.* v. *N.L.R.B., supra* at 843; *Home Town Foods, Inc.* v. *N.L.R.B., supra* at 244.

The differences in the approaches taken by the Court of Appeals and other courts of appeals in determining whether a post-election hearing is required mean that an objecting party's right to such a hearing can depend in the final analysis upon which court of appeals considers his claim. That such is the situation in this case is demonstrated by the Fifth Circuit's decision in *N.L.R.B.* v. *Monroe Auto Equip. Co., Hartwell Div.*, 406 F. 2d 177 (5th Cir. 1969). One of the employer's post-election objections in that decision is essentially identical to the Com-

pany's objection with regard to the Union observer's conduct on election day. As in this case, the Regional Director had concluded that a preponderance of the evidence showed that the union observer had not campaigned and in any event such contention was not of such serious nature as to warrant setting aside the election. *Id* at 179. Notwithstanding a strong denial of the employer's claim which appeared from the Regional Director's *ex parte* investigation, the Fifth Circuit held that a hearing was required in order to resolve the conflicting statements of the witnesses. Thus, it is apparent that the decisional conflict between the Court of Appeals and the other courts of appeals is such that contrary results are produced in decisions involving almost identical factual situations.

II. The case presents an important question of federal law which has not been, but should be, settled by this Court.

The case presents an opportunity for this Court to clarify for these and future litigants the extent to which an objecting party is entitled to a post-election evidentiary hearing pursuant to the constitutional principles of due process and the Board's administrative standards.

It is axiomatic that crucial disputed facts should be resolved by taking testimony under oath, granting the opportunity to cross-examination and providing the procedural safeguards of a hearing. While the truth of this proposition is self-evident, guidelines as to its application with regard to an objecting party's right to a post-election hearing are lacking. Clearly such guidelines are needed when two courts of appeals will reach exactly opposite decisions on essentially the same facts and issues. With such guidelines available to the Board's agents and

parties in future representation matters, the uncertainty surrounding the extent to which a post-election hearing is required will dissipate, ending the expensive and protracted litigation which such uncertainty spawns. It is only when the right to such a hearing is defined that the parties to a representation election can be assured that their right to have such election conducted in the laboratory conditions promised by the Board and required by the courts will be fully protected. *See Sewell Mfg. Co.*, 138 NLRB 66, 70 (1962); *Tyler Pipe and Foundry Co.* v. *N.L.R.B.*, 406 F. 2d 1272, 1275 (5th Cir. 1969).

CONCLUSION

For the foregoing reasons, it is submitted that this petition for certiorari should be granted.

Respectfully submitted,

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Dated August 12, 1969